Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

# Supreme Court of the United States

MARK WARD,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT, U.S.

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29pp

## QUESTIONS PRESENTED

1. Whether Appellant was wrongfully convicted under 17 U.S.C. 844(i) for the arson of a private residence not in active use in interstate commerce in violation of *Jones v. United States*, 120 S.Ct. 1904 (2000).

2. Whether Petitioner was wrongfully convicted of and sentenced for an offense not charged in, and in fatal variance to, the indictment, a Schedule II controlled substance, and received an illegal sentence beyond the statutory maximum authorized for the Schedule III controlled substance that he was actually indicted for in violation of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000).

3. Whether Petitioner was deprived of his constitutional right to be present at a critical state of his trial when the trial judge engaged in an *ex parte* discussion with the jurors in the midst of deliberations without first informing Petitioner and without obtaining a knowing and voluntary waiver of his presence thereat.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Mark Ward respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

## CITATIONS TO OPINIONS BELOW

The Order denying the Petition for Rehearing and for Rehearing En Banc was entered by the Eighth Circuit Court of Appeals on November 28, 2001. The Order dismissing Petitioner's appeal and affirming the District Court's denial of the Application for Certificate of Appealability was entered by the Eighth Circuit Court of Appeals on September 18, 2001. The Order of the District Court denying the Application for Certificate of Appealability was entered on March 7, 2001. The Memorandum and Order of the District Court denying the Petitioner's Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. 2255 was entered on February 2, 2001. (Appendix A).

## JURISDICTION

This Court has jurisdiction to consider this case by way of a writ of certiorari pursuant to 28 U.S.C. 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution which provides in pertinent part: No person shall be deprived of life, liberty or property without due process of law.

This case involves the Sixth Amendment to the United States Constitution which provides in pertinent part: In all criminal prosecutions, the accused shall enjoy the right . . . to confront witnesses [and] . . . to a jury trial.

## STATEMENT OF THE CASE

### 1. Course Of Proceedings And Disposition Below.

The Petitioner was tried and convicted on June 26, 1996 for conspiracy to manufacture methamphetamine in violation of 21 U.S.C. 846, use of fire and explosive material to destroy property used in interstate commerce in violation of 18 U.S.C. 844(i), and destruction of property to prevent seizure of evidence in violation of 18 U.S.C. 2232(a). He received a sentence of 235 months imprisonment. Petitioner was appointed counsel for his appeal. On direct appeal, filed by appointed counsel, the Petitioner's judgment and sentence were affirmed. The Petitioner also filed a pro se brief on direct appeal claiming errors raised subsequently in this matter, but there is no record that his allegations of error were ever addressed by the Eighth Circuit Court of Appeals.

On October 5, 1999, Petitioner filed a motion for relief pursuant to 28 U.S.C. 2255. On February 2, 2001, the

District Court denied the 2255 motion without any evidentiary hearing thereon. The Petitioner timely filed a Notice of Appeal on March 2, 2001. The Eighth Circuit Court of Appeals treated the notice of appeal as an application for certificate of appealability and denied the application on September 18, 2001.

The Petitioner is currently in the custody of the Bureau of Prisons.

**2. Statement Of The Facts**

Petitioner was convicted of being a member of a conspiracy to manufacture and sell methamphetamine headed and run by his co-defendant Tom Whitehurst. The Petitioner was convicted of arson for helping set the fire that destroyed the residence of Tom Whitehurst and Stacy Gessaman during a raid by federal law enforcement agents.

Whitehurst and Gessaman held themselves out as husband and wife and rented the subject residence together. It is undisputed that the residence had previously been used for other purposes, but for quite some time it had been a personal residence. Law enforcement agents confirmed under oath that Whitehurst and Gessaman were renting the ranch-style building as a personal residence. The owner of the property rented the home to Whitehurst and Gessaman as a residence. The caretaker of the property also testified that Whitehurst and Gessaman used the house as a personal residence. The area initially referred to as a "beauty salon" was actually used

by several previous tenants as a storage area, for firewood, and was also referred to as a "shop" area where the furnace was located.

The Government presented repeated hearsay testimony from its informant in an attempt to tie the Petitioner into the Whitehurst drug conspiracy, much of which differed from his initial statements. The informant testified that Petitioner was just a user of drugs and that his role as user did not change. When the Whitehurst organization moved to Sullivan, Missouri in early summer 1995, the informant again saw Petitioner just sitting around doing nothing. The informant further testified that the Appellant was just using methamphetamine at the Sullivan farm. This informant himself began cooking methamphetamine for, and with, Whitehurst at the Sullivan farm, but the Petitioner was not one of the individuals involved in the cooking operation. Rather, Petitioner was simply one of a number of people who would show up to get methamphetamine for personal use when the cooking process was completed. While the Government asserted that the Petitioner had made a cooking vessel for the informant and had made a propane tank with a false bottom for Whitehurst, the informant testified that he knew nothing of this.

The reliability of the informant is questionable. During the time of the Whitehurst conspiracy, the informant's drug use began to affect him. After trial it was disclosed that the informant had been diagnosed with "borderline personality disorder", "paranoid personality disorder", and "schizotypal personality disorder". Furthermore, he continued to experience drug-induced psychoses that affected his memory during the events that he testified to.

Finally, despite the informant's admissions that he repeatedly lied to cops, he was paid $1,500.00 per month by the FBI beginning before, and continuing through, Petitioner's trial.

## REASONS FOR GRANTING WRIT

1. **The Petitioner was wrongfully convicted under 18 U.S.C. 844(i) for the arson of a private residence not in active use in interstate commerce, in violation of *Jones v. United States*, 120 S.Ct. 1904 (2000).**

   A. **Facts presented at trial were inconsistent with finding of guilt for the offense of arson under 18 U.S.C. 844(i) where the essential element of interstate commerce was never proven.**

The Petitioner was convicted of arson for assisting the setting of a fire that destroyed the residence of two individuals, Tom Whitehurst and Stacy Gessaman. This fire was allegedly set during a raid at that location by federal law enforcement agents.

Contained within the elements of the offense of arson as described in 18 U.S.C. 844(i) is the jurisdictional requirement that the property was either used in interstate commerce, was used as an economic enterprise or had a substantial effect on interstate commerce. *United States v. Denalli*, 73 F.3d 328 (11th Cir. 1996), *modified*, 90 F.3d 444 (11th Cir. 1996) (arson of a neighboring residence does not have a substantial effect on interstate commerce). This statute will always, on its face, require a commerce clause analysis so as to establish federal jurisdiction. *See, e.g., United States v. Lopez*, 514 U.S. 549, 115

S.Ct. 1624 (1995). Failure of the government to prove this element beyond a reasonable doubt mandates no finding of guilt for this offense under our laws. Section 2255 contemplates the redress of an improper finding of guilt based upon the failure of proof.

In this case, the government failed completely to establish federal jurisdiction for this offense and failed to prove the interest commerce element of the crime. While the government argues that the jury heard evidence that the underlying drug conspiracy involved in the case operated in two states, that evidence was only applicable to the drug conspiracy and was never linked to the property at issue. During opening argument in the case, the prosecution acknowledged that they were required to show interstate commerce for the offense of arson; however, during the trial, the government failed to present any evidence that proved this issue. In fact, the only evidence presented either to the grand jury or at trial demonstrated that the home was a personal residence (as opposed to a business). As such, the government completely failed to carry its burden in regard to this offense.

**B. Trial and appellate counsel were ineffective for failing to raise the jurisdictional issue outlined above either as a proper motion for directed verdict at trial or as an issue on appeal thus depriving Petitioner of the right to effective assistance of counsel.**

Petitioner's trial and appellate counsel, Jane C. Hogan and Laura B. Allen, were ineffective in that they failed to identify and address this issue at the proper time. Trial attorney Hogan failed to move for a directed

verdict of acquittal on this ground so as to argue the above jurisdictional and element of proof issue to the trial court. Had trial counsel argued this issue, the trial court would have been compelled under the law to direct a verdict of acquittal on this count. This is true based upon existing law within the District Court's own Circuit, as well as the precedent of this Court.

For instance, in *Jones v. United States, supra,* this Court held that 18 U.S.C. 844(i) does not reach to private residential property, even if there is "merely a passive, passing or past connection to commerce." *Jones* at 1912. This limitation on the scope of 18 U.S.C. 844(i) has been acknowledged and adopted by the Eighth Circuit as well. *See, United States v. Rea,* No. 98-2546 (8th Cir., August 11, 2000), and *United States v. Ryan,* 227 F.3d 1058 (8th Cir. 2000). The *Jones* decision and the Eighth Circuit Court of Appeals cases cited are applicable to Petitioner's case even on collateral review since any decision herein will amount to one addressing the substantive reach of a federal statute [as opposed to a new constitutional rule of criminal procedure which is barred from applicability on collateral review pursuant to *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060 (1989)]. *Bousley v. United States,* 523 U.S. 614, 118 S.Ct. 1604 (1998).

The District Court has ruled in this matter that the Petitioner is barred from raising this claim because it was not raised on direct appeal. However, the failure to raise this issue on direct appeal amounted to ineffective assistance of appellate counsel. This is due to the fact that the error complained of actually harmed or prejudiced the Petitioner's rights to a fair trial, to equal protection of the

laws, and to effective assistance of trial counsel. Additional prejudice exists in that the rule created is one that is in direct conflict with the precedents of *Jones*, *Rea*, and *Ryan* as described more fully above. The failure to raise this highly meritorious issue is not the fault of the Petitioner, but of the Petitioner's prior appellate counsel. If such failure of the part of appellate counsel actually harmed the Petitioner, then redress is proper. Petitioner believes that same has been demonstrated.

**C. Conflict in laws must be addressed by this Court.**

If allowed to stand, the lower court's holding will create a conflict between that decision and this Court's holding in *Jones* as well as the existing precedent of *Rea* and *Ryan* cited herein. This Court should grant review of this case to correct the error complained of above and to ensure that the decision in this case conforms to existing precedent, thereby ensuring equal justice under our laws. Based on the errors complained of above, Petitioner's conviction should be overturned.

**2. The Petitioner was illegally sentenced by the District Court in that he was sentenced for an offense that he was not convicted of and, as his sentence exceeded the maximum sentence allowable for the offense of conviction, in violation of *Apprendi*.**

**A. Fatal error in the Indictment led to Court's sentencing error.**

Petitioner was charged in Count I of the Indictment (4:96-CR-0024-CEJ) herein with conspiracy to manufacture

a **Schedule III** controlled substance, methamphetamine. A Superseding indictment was later filed, again charging Petitioner with the same language in Count I as previously charged. The problem with the language of this charge is immediately apparent on its face. 21 U.S.C. § 812(c) defines methamphetamine as a **Schedule II** controlled substance. **Schedule III** does include amphetamine as a listed drug, but specifically excludes methamphetamine from its list. As such, the Indictment contained a fatal defect in that it charged the language of the conspiracy statute, but included as a material element of the manufacturing language that the government would prove a **Schedule III** substance was manufactured.

**B. Error in Indictment was both known to the Court and was preventable.**

On June 5, 1996, the government, recognizing the error in the indictment listed above, and recognizing that they would be unable to prove that the Petitioner/Defendant had conspired to manufacture a Schedule III controlled substance, moved to amend the superseding indictment. Amazingly, the District Judge denied the Government's motion by Order of June 10, 1996. There is no rational explanation for failing to correct this obvious facial error to the indictment.

**C. Insufficient evidence existed to support the conviction of the Petitioner as to Count I – Conspiracy to Manufacture a Schedule III Controlled Substance.**

As expected, at trial, the Government was unable to present any evidence whatsoever that the Petitioner conspired to manufacture any type of Schedule III controlled substance. This was a material element of the offense **as charged**, an element which was required to be proven beyond a reasonable doubt to support conviction. It is undisputed that evidence regarding the substance methamphetamine was presented to the jurors. Nevertheless, no Schedule III controlled substances were included in this evidence.

Petitioner was subsequently convicted of Count I of the Indictment, as written and charged by the Court. Such a verdict was not supported by the evidence in the case. The Government may now argue that the language of the Indictment was merely surplusage and that the Schedule III language, though they attempted to alter it, was not material to any findings by the jurors as the schedule language is only to be understood in conjunction with the language regarding the substance involved – that the one merely legally defines the other. Such argument is not supported either by the actions of the Government, nor a plain language reading of the Indictment. If the Government's position were true, then the Schedule III language could not have any significance independent of the substance language, i.e., methamphetamine. However, clearly, the Government could have charged ONLY the schedule language without mention of the substance. Certainly, defense could have filed

a bill of particulars to force the Government to specify the precise Schedule III drug referenced. However, to comport with the legal requirements of the status, the substance itself was equally capable of being removed from the Indictment language. Furthermore, the Government's position fails to address the further ambiguity that was possible in the Indictment: That Count I, as written, required the Government to establish that **two** different illegal controlled substances had been manufactured – one, a Schedule III substance **AND** methamphetamine. This alternative reading of the statute is equally plausible.

As written, insufficient evidence was presented to support the conviction in Count I of the Indictment. The jury could not have found, beyond a reasonable doubt, that the Petitioner conspired to manufacture a Schedule III controlled substance or a Schedule III controlled substance and methamphetamine. It cannot be said that the Schedule III language was mere surplusage to this Count of the Indictment. A defendant has a fundamental constitutional right to be tried on only those charges presented in a grand jury indictment. *Stirone v. United States*, 361 U.S. 212 (1960). For these reasons, the verdict as rendered, should be overturned and a new trial ordered.

**D. Improper verdict led to illegal sentence.**

Under 21 U.S.C. § 841, the maximum sentence which a defendant can receive for conspiracy to manufacture a Schedule III controlled substance such as amphetamine is five (5) years or sixty (60) months. At sentencing in this case, Petitioner was sentenced by the District Judge as if

guilty of conspiring to manufacture a Schedule II controlled substance – methamphetamine. The base offense level difference between methamphetamine and amphetamine under the United States Sentencing Guidelines § 2D1.1 is sixteen (16) levels. As a result of the trial court's interpretation of the jury's improper verdict, the District Judge sentenced the Petitioner to two hundred and thirty-five (235) months.

The sentence, as rendered, exceeded the statutory maximum sentence for a Schedule III controlled substance. The District Court acted in violation of clear precedent in sentencing the Petitioner based upon an unlawful verdict that served to increase not only his actual sentence under the U.S. Sentencing Guidelines, but also increased his statutory maximum sentence. *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The Judge effectively decided that the jury, through its verdict, was actually convicting the Petitioner of Conspiracy to Manufacture a **Schedule II** controlled substance, rather than the Schedule III that was charged. This interpretation of the verdict by the Court, without specific juror clarification, and which led to an increased sentence beyond that envisioned by Schedule III violations, is specifically the type of sentencing that has been discredited in *Apprendi*.

**E. Trial and appellate counsel provided ineffective assistance of counsel in failing to address this issue to the District Court in the appropriate manner.**

Trial counsel made no objection to the refusal by the District Court to refuse to allow the Indictment to be

amended. Furthermore, trial counsel made no objection to the Petitioner's illegal sentence at the time of sentencing. Finally, appellate counsel, though made aware of this claim of error in the Petitioner's Pro Se direct appeal, erroneously did not adopt this issue in that appeal. Petitioner submits that the appeal of this issue is timely under *Rodgers v. United States*, 229 F.3d 704 (8th Cir. 2000). The appeal herein is the first opportunity which the Petitioner has had to properly address this issue.

The error complained of was clearly harmful and prejudiced the Petitioner. As such, the failings on the part of trial and appellate counsel to adequately address these issues in a timely fashion amounted to ineffective assistance of counsel. Petitioner should, therefore, be granted a new trial based upon the prejudice that occurred as a result of the improper verdict and illegal sentence in his case.

Based upon the within and foregoing, the Petitioner prays that this Court will grant his Writ and allow him to more fully address his claims with this Honorable Court. These issues are not raised frivolously but involve issues of constitutional significance not only to this Petitioner, but others whose cases may be similarly situated. Petitioner hopes that this Court will review his case and grant him the relief that has been requested.

**3. The Petitioner was denied his right to be present at every stage of his proceedings when the District Court judge, during jury deliberations in his case, conducted *ex parte* communications with the jury outside the presence of the Petitioner and counsel.**

**A. Improper communication clearly occurred.**

After commencing deliberations in this case at 4:35 p.m. on June 26, 1996, there was communication between the Court and the jury outside the presence of – and without the consent of – the Petitioner. The trial record reflects that at approximately 7:30 p.m., the Court went and inquired as to the continued course of the jury deliberations that evening. See Docket 136. The record is silent as to what precipitated this action on the part of the judge, whether it was spontaneous, or at the request of the jurors. However, whatever discussion occurred or responses were given to inquiries made, it was without the participation of the Petitioner and his counsel. Petitioner was neither afforded the opportunity to glean the substance of the communication or to voice objection or response to any decisions made. Petitioner at no time had waived his right to be present at this or any other stage of the proceedings.

**B. Right to be present is fundamental to our judicial system.**

Every defendant has the fundamental constitutional right to be present at all critical stages of his proceeding. This right arises from the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fifth Amendment. *See Lewis v. United States*, 146 U.S. 370

(1892); *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057 (1970). Nowhere is that right to be present more critical than when the court and the jury interact and communicate about the case. The defendant, and only the defendant, can waive his right to be present – but all judge-jury communications are strictly forbidden in the absence of such a clear waiver. *See, e.g., Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019 (1938); *Rogers v. United States*, 422 U.S. 35, 95 S.Ct. 2091 (1975). There can be no dispute that an improper communication forbidden by the above precedents occurred in this case.

**C. Prior appellate counsel was ineffective for failing to raise this issue on appeal, especially where Petitioner filed a pro se motion, placing appellate counsel on notice of Petitioner's desire to raise this meritorious issue.**

On appeal, Petitioner filed a pro se motion to appeal his conviction. Subsequently, Petitioner's appointed counsel filed an amended appeal which did not include this enumeration of error cited herein. Appellant counsel was aware of Petitioner's desire to include this issue in his appeal but chose not to raise that issue. As such, Petitioner should not be punished for the failings of his appellate counsel. Furthermore, given the clear legal authority supporting this issue as a legitimate grounds of error necessitating, at the very least, an evidentiary hearing to determine the degree of prejudice to the Petitioner, the failure of appellate counsel to raise this issue and request an evidentiary hearing amounted to ineffective assistance of appellate counsel.

Where, as here, the ineffective assistance of appellate counsel leads to the failure of the District Court to consider harmful error on appeal, Petitioner has the right to obtain relief from the higher courts for such failing. Petitioner is not in a position to argue that the error which occurred actually harmed his defense as the lower court precluded an evidentiary hearing on this matter. As such, the appropriate remedy for this breach of Petitioner's constitutional right to be present at all stages of the proceedings, is for this Court to remand the case to the District Court with instructions to conduct the appropriate evidentiary hearing, at which time a complete record of the offending communication may be established and any prejudice which occurred as a result of the improper communication may be identified.

Petitioner asks this Court, therefore, to grant this Writ so that the error complained of may be adequately addressed and the relief sought may be obtained.

Respectfully submitted,

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## UNITED STATES COURT OF APPEALS
## FOR THE EIGHTH CIRCUIT

No. 01-1644

| | | |
|---|---|---|
| Mark D. Ward, | * | |
| | * | |
| Appellant, | * | Appeal from the United |
| vs. | * | States District Court for the |
| United States of America, | * | Eastern District of Missouri |
| | * | |
| Appellee. | * | |

Before MCMILLIAN, HANSEN, and BYE, Circuit Judges

### JUDGMENT

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

(5361-010199)

September 18, 2001

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

| | | |
|---|---|---|
| MARK WARD, | ) | |
| | ) | |
| Plaintiff, | ) | Case No. ~~4:00CV1508~~ |
| | ) | 4:99CV1558 CEJ |
| vs. | ) | |
| | ) | |
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Defendant. | ) | |

**ORDER**

(Filed Mar. 7, 2001)

This matter is before the Court on the application of Mark Ward for a certificate of appealability pursuant to 28 U.S.C. §2253. This Court denied Ward's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 in an order filed February 2, 2001. Because Ward has failed to make a substantial showing of the denial of a constitutional right, a certificate of appealability will be denied. *See Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997) (substantial showing requires that "issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings").

Accordingly,

**IT IS HEREBY ORDERED** that a certificate of appealability [#17] is **denied.**

/s/ Carol E. Jackson
CAROL E. JACKSON
UNITED STATES DISTRICT JUDGE

Dated this 7th day of March, 2001.

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MISSOURI**
**EASTERN DIVISION**

| | | |
|---|---|---|
| MARK WARD, | ) | |
| Movant, | ) | |
| v. | ) | No. 4:99-CV-1558 (CEJ) |
| UNITED STATES OF AMERICA, | ) | |
| Respondent. | ) | |

## MEMORANDUM AND ORDER

(Filed Feb. 2, 2001)

This matter is before the Court upon the motion of Mark Ward to vacate, set aside or correct sentence pursuant to 28 U.S.C. §2255. The United States has filed a response in opposition.

On June 26, 1996 a jury found Ward guilty of conspiracy to manufacture methamphetamine, in violation of 21 U.S.C. §846 (Count I); use of fire and explosive material to destroy property used in interstate commerce, in violation of 18 U.S.C. §844(I) (Count II); and destruction of property to prevent seizure of evidence, in violation of 18 U.S.C. §2232(a) (Count III). He was sentenced to an aggregate term of imprisonment of 235 months. On appeal, the judgment and sentence as to Ward were

affirmed.[1] *United States v. Whitehurst*, 138 F.3d 344 (8th Cir. 1998).

In his motion for postconviction relief, Ward asserts the following claims for relief:

1. The government failed to prove that the property at issue in Count II was used in interstate commerce or that the burning of the property had a substantial effect on interstate commerce.

2. Movant was convicted of and sentenced for conspiracy to manufacture methamphetamine, a Schedule II controlled substance, but the indictment referred to methamphetamine as a Schedule III controlled substance.

3. The trial court improperly communicated with the jury in movant's absence and without his knowledge.

4. The trial court allowed the prosecutor to comment on movant's exercise of his Fifth Amendment rights.

5. The trial court erred by refusing to allow movant to cross-examine a government witness.

6. The trial court erred by admitting hearsay testimony from Special Agent Richard Egelston concerning statements made by cooperating witness William Austin.

7. The trial court erred by excluding the testimony of a fire expert who had been retained by the defense.

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[1] The Court of Appeals remanded the case for resentencing with respect to one of Ward's co-defendants, William Fred Coleman, Jr.

8. Government agents promised and gave money and services to William Austin to influence his testimony and failed to disclose this to the defense in a timely manner.

9. The trial court failed to make explicit findings as to the foreseeability of conduct by the co-conspirators and the scope of movant's involvement in the conspiracy.

10. The trial court improperly calculated the quantity of methamphetamine attributable to movant.

11. The trial court erred by refusing to reduce movant's offense level based on his role as a minor or minimal participant.

12. The evidence was insufficient to support convictions.

13. Movant was denied effective assistance of counsel at trial and on appeal.

A motion under 28 U.S.C. §2255 is not a vehicle for relitigating issues addressed on direct appeal. *English v. United States*, 998 F.2d 609, 612-13 (8th Cir. 1993), *cert. denied*, 510 U.S. 1001 (1993). A movant may be excepted from this rule if his claims result from some intervening change in the law or from newly discovered evidence. *Id.* The claims Ward asserts in grounds 4, 5, 6, 7, 9, 10, 11 and 12 of his motion are identical to claims he asserted on direct appeal. All of these claims were decided adversely to him. None of the claims result from any change in the law occurring since the direct appeal nor are they based on newly discovered evidence. Consequently, Ward cannot relitigate the claims in this collateral proceeding.

Although he could have done so, Ward did not present on direct appeal the claims he asserts in grounds 1, 2, 3, and 8 of his motion. Consequently, the claims are procedurally defaulted. *Swedzinski v. United States*, 160 F.3d 498, 500-01 (8th Cir. 1998) In order to obtain relief under §2255 in spite of the procedural default, Ward must show (1) cause excusing his failure to present the claims on direct appeal and (2) actual prejudice resulting from the procedural default. *United States v. Frady*, 456 U.S. 152, 170-71 (1982); *Swedzinski*, 160 F.3d at 501. In an apparent effort to show cause, Ward alleges that the deficient legal representation he received prevented him from presenting these claims on direct appeal. Assuming, *arguendo*, that Ward can demonstrate cause, he makes no showing that the errors he complains of "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Frady*, 456 U.S. at 171. Because Ward has not overcome the procedural bar, the Court will not consider the claims he raises in grounds 1, 2, 3, and 8.

Ward's final claim (ground 13) is that he was denied effective assistance of counsel at trial and on appeal. In order to prevail on a claim of ineffective assistance of counsel, a movant must show (1) that his attorney's performance fell below an objective standard of reasonableness and (2) that movant was prejudiced thereby. *Strickland v. Washington*, 466 U.S. 658, 687 (1984). Movant must show that his attorney's errors were so serious that they deprived him of his Sixth Amendment right to counsel and denied him his right to a fair trial. *Id.* Judicial scrutiny of counsel's performance must be highly deferential, and the movant must overcome the presumption

that the challenged action might be considered sound trial strategy. *Id.* at 689. In deciding a claim of ineffective assistance, the court must examine the specific "acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment," and then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.* at 691. In order to establish prejudice, the movant must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

In the instant case, Ward has alleged a laundry list of errors committed by his attorneys. However, he makes no showing that these errors, singly or in combination, were so serious that his attorneys were "not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Id.* at 687. Further, Ward makes no showing that, but for his attorneys' alleged errors, the results of the proceedings would have been different. Absent such a showing of prejudice, Ward cannot sustain his claim of ineffective assistance of counsel.

For the foregoing reasons, the Court concludes that Ward is not entitled to relief. Accordingly,

**IT IS HEREBY ORDERED** that the motion of Mark Ward to vacate, set aside or correct sentence pursuant to 28 U.S.C. §2255 is denied

/s/ Carol E. Jackson
CAROL E. JACKSON
UNITED STATES DISTRICT JUDGE

Dated this 2nd day of February, 2001.

## UNITED STATES COURT OF APPEALS
## FOR THE EIGHTH CIRCUIT

No. 01-1644

| | | |
|---|---|---|
| Mark D. Ward, | * | |
| Appellant, | * | Order Denying Petition for Rehearing and for Rehearing En Banc |
| vs. | * | |
| United States of America, | * | (Filed Nov. 28, 2001) |
| Appellee. | * | |

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

November 28, 2001

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit